

NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

UNITED FOOD AND COMMERCIAL
WORKERS AND PARTICIPATING FOOD
INDUSTRY EMPLOYERS TRI-STATE
HEALTH AND WELFARE FUND, et
al.,

Civil No. 04-1226(RMB)

Plaintiffs,

v.

SUPER FRESH FOOD MARKETS INC.,
et al.,

Defendants.

MEMORANDUM

Appearances:

Mark E. Belland, Esquire
Steven J. Bushinsky, Esquire
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Attorneys for Defendants

BUMB, United States District Judge

On March 6, 2009, this Court held that the Defendants were entitled to an award of attorney's fees and costs incurred with

respect to the litigation of the Breach of the Participation Agreement. The Court directed the Defendants to supply a breakdown of its fees and costs associated with the prosecution of the Participation Agreement.

Pursuant to the Court's direction, Defendants seek an award of \$311,336.35.¹ Plaintiffs object to the award on several grounds: 1) that the total number of hours is unreasonable due to overstaffing as well as excessive and redundant billing; 2) that the invoices are so heavily redacted that it is impossible to decipher the number of hours spent on the Participation Agreement claim; 3) that the Defendants failed to produce evidence of the prevailing market rate; and 4) that the total expenses are excessive. The Court addresses each of these objections in turn below.

A. Hours

Defendants attempted to calculate the hours they devoted to the defense of the Plaintiffs' Breach of the Participation Agreement claim.² In doing so, Defendants established separate

¹ The Court wishes to acknowledge the helpful and thorough breakdown prepared by Defendants' counsel.

² It is noteworthy that the Defendants excluded fees for several attorneys and paralegals who participated in the litigation. Defendants limited their request for fees to the work performed by Don A. Innamorato, Esq., Jami Segota, Esq., Meghan Offer, Esq., and Hollis Hurd, Esq. See Certification of Don A. Innamorato, Esq., at ¶ 1. Defendants further reduced their requested award to reflect a 20% discount counsel (except Hurd) had afforded them in all invoices during the period May 1,

calculation methods for each step of the litigation broken down into the following phases: (1) pretrial discovery preparation; (2) summary judgment; (3) trial time and (4) post-trial submissions. The Court finds that the approach the Defendants undertook to arrive at a means of quantifying their fees and costs incurred in their defense against Plaintiffs' Participation Agreement claim to be reasonable.

First, with respect to their pre-trial discovery and preparation fees, Defendants reasonably allocated 13% of their total time to the Participation Agreement claim, for a total of \$134,222.11. With respect to their fees incurred in connection with their summary judgment motion, Defendants arrived at a reasonable allocation by an examination of all the legal issues presented and apportioning 13.5% of the total to the Participation Agreement claim, for a total of \$22,391.03. As for the trial fees, Defendants allocated 35% of the total trial fees to the Participation Agreement claim. The Court finds that this allocation fairly represents the percentage of time spent at trial relating to the Participation Agreement claim. This results in an amount of \$76,855.46. Finally, Defendants allocated \$19,975.00 to post-trial submissions. The Court finds that the manner in which Defendants arrived at this conclusion (set forth in their papers) to be reasonable.

2008, through July 31, 2008. Id. at ¶ 2.

Plaintiffs argue that because it is impossible to determine the amount of time the Defendants actually expended on the Participation Agreement claim during pretrial discovery, Defendants are not entitled to any such fees. The Court disagrees. The billing time entries demonstrate the hours spent answering interrogatories, preparing for depositions (of individuals who were competent to testify about the Participation Agreement), and various conferences relating to the production of discovery. It is not unreasonable that the Defendants did not contemporaneously breakdown the time spent on a deposition or preparing for a deposition for each issue discussed.

Second, Plaintiffs argue that Defendants' own methodology relating to the fees charged for the summary judgment motion was flawed. According to Plaintiffs, the amount should be \$6,816.83. Plaintiffs propose that the Defendants should only be awarded fees related to the amount of pages addressed to the Participation Agreement claim, as Defendants had proposed with respect to their post-trial fees. Yet, the Court finds that awarding fees on this "per page basis" gives short shrift to the amount of time and effort defense counsel put into addressing the claim in its summary judgment motion. Substantial time was required to prepare the motion papers, yet this would not be adequately reflected in a "per page basis" calculation. See Garden State Auto Parts Pontiac GMC Truck, Inc. V. Electronic

Data Systems Corp., 31 F.Supp. 2d 378, 382 (D.N.J. 1998))("the amount of attorney's fees awarded by the Court must be reasonable under the circumstances of the case.")

Plaintiff also quarrels with Defendants' allocation of 35% to the time devoted at trial. Plaintiffs' argument is flawed, however, because they construe the Breach of the Participation Claim too narrowly. This claim was not limited to the four corners of the Participation Agreement, but to the events and transactions leading up to and flowing from the Agreement as detailed at trial and in this Court's Opinion and Order at pages 8 through 11. As set forth in the Court's Opinion, this claim included arguments that the Defendants agreed on numerous occasions to transfer and pay for the Local 27 A & P retirees as well as extrinsic evidence of the parties' bargaining history.

Finally, Plaintiffs contend that the total hours are extensive because the case was overstaffed, specifically, the continuous use of four lawyers - - Don A. Innamorato, Esq., Jamie Segota, Esq., Meghan Offer, Esq., and Hollis Hurd, Esq. To illustrate their point, Plaintiffs point to the bills which reveal that almost 35 hours (Innamorato 9.0; Offer 10.0, Segota 9.20, and Hurd 6.50) were billed for one trial day. See Plaintiffs' Br., at 7-8 [Docket No. 203].

In complex cases, such as this one, it is not unreasonable to have more than one attorney. Indeed, Plaintiffs were

represented by several attorneys, two of whom appeared daily at trial (Brett Last, Esq. and Mark Belland, Esq.) See, e.g., Docket Entry No. 104. (Brett Last, Esq., Mark Belland, Esq., and Steven Bushinsky, Esq.) This case warrants a finding of non-excessiveness for the time spent by four attorneys. Clearly, this was a highly-detailed, multi-defendant ERISA action involving substantial discovery, motions, testimony and exhibits. The transactions at issue spanned decades. Moreover, with respect to Mr. Innamorato, Ms. Segota and Ms. Offer the Court observed first-hand at trial the amount of work that these attorneys put into the case. Mr. Innamorato and Ms. Segota, much like both counsel for Plaintiffs, shared the tasks of examining the witnesses and introducing testimony. Ms. Offer valuably contributed to the presentation of evidence, coordination of exhibits and the like. As such, the Court will allow an award based upon the hours expended by these attorneys. It is not apparent to the Court, however, that Mr. Hurd's attendance at trial was essential to the presentation of the case. Indeed, the Court cannot recollect one instance where Mr. Hurd participated in the trial. Accordingly, the Court will not award the trial time of Mr. Hurd (34.33 x \$350.00 in 2007) and (64.75 x \$350.00) in 2008 totaling \$34,678.00.

B. Redundant Bills

Plaintiffs further contend that Defendants' bills were

redundant and therefore excessive. As an illustration, Plaintiffs cite to entries on the invoices dated February 13, 2007, February 15, 2007, February 26, 2007, March 8, 2007, March 12, 2007, April 9, 2007, and April 10, 2007. The Court has reviewed these entries as well as other entries for redundancy, and it does not find that the work performed by the attorneys was redundant or excessive. Some of the entries involve conferences that the lawyers had with each other. These types of conferences are expected to occur when there are several lawyers working together on a complex case. Moreover, the entries themselves demonstrate that the lawyers performed separate and distinct tasks post-conferences.

C. Hourly Rates

Plaintiffs also question the reasonableness of the hourly rate. The Court's approach in assessing the reasonableness of a claim for attorney's fees is governed by the "'lodestar' formula, which requires multiplying the number of hours reasonably expended by a reasonable hourly rate." Maldonado v. Houstoun, 256 F.3d 181, 184 (3d Cir. 2001) (citing Hensley v. Echerhart, 461 U.S. 424 (1983)). The party seeking the fees bears the burden of proving the reasonableness of the claimed hourly rate. Interfaith Community Organization v. Honeywell Intern, Inc., 426 F.3d 694, 703 n.5 (3d Cir. 2005). The party must show that lawyers of comparable ability commanded the rates the party is

seeking.

To support their requested hourly rates, Defendants have submitted the Certification of Brian Ansell, a Senior Manager-Credit Control in the accounting department of Defendants' counsel's firm (the "Ansell Certification"). According to the Ansell Certification, the firm analyzes and compares its billing rates with the billing rates charged by firms of similar size for attorneys of equivalent experience and expertise in comparable geographic markets. Based upon his analyses for 2007 and 2008, Ansell arrived at the requested billing rates for attorneys Innamorato, Segota and Offer.³ Further, according to the Ansell Certification, he relied upon the Thompson Peer Monitor, an online gathering tool, to compare the requested billing rates with rates charged by peer firms. The comparisons presented to the Court confirm that the Defendants' counsel's rates were close to the median of rates charged by comparable attorneys in the litigation area. Thus, the Court finds that the Defendants have sustained their burden of proving the reasonableness of the requested rates by their counsel. Accordingly, the Court will award **\$218,765.60** in attorney fees.

D. Excessive Expenses

Finally, Plaintiffs argue that the amounts Defendants seek

³ The Ansell Certification is persuasive also as to the reasonableness of the rate charged by attorney Hurd.

for costs and expert fees are excessive. First, Plaintiffs argue that Defendants' request for duplicating printing/scanning costs are "outrageous and excessive." Plaintiffs' Br. at 13. The Court disagrees. Defendants assessed costs at a reasonable rate of \$.15 per page. This complex case involved an inordinate amount of exhibits, requiring extensive photocopying. The documentation Defendants have provided is sufficient.

Plaintiffs next contend that Defendants failed to establish the reasonableness of their experts' fees. The Court disagrees. Defendants incurred \$89,292.39 in costs for the services of its economic expert from February 20, 2007, until December 24, 2007. The expert focused upon the preparation of an economic analysis and report, which included specific sections addressing the Participation Agreement claim and its potential impact on their overall damages in this case. Given the experts' analyses, the Defendants appropriately allocated one-third of the fees to the Participation Agreement claim. As for the amount of the fees, the Certification of Fred Harley, Controller for National Economic Research Associates, Inc. ("NERA") demonstrates that the experts' hourly billing rates are reasonable. Indeed, Plaintiffs' own expert witness, Karen Mallet, FSA, charged \$325-330 per hour while the average rate for Defendants' experts was \$313. Accordingly, the Court finds Defendants' request for \$29,466.49 to be reasonable.

Finally, Plaintiffs contend that they should not have to pay for lodging, meals or taxi expenses. The Court agrees. There is no explanation by Defendants as to what necessitated these expenses; thus, it is not apparent why Plaintiffs should be required to pay these as necessary expenses. Accordingly, the requested costs for lodging (\$11,778.81), meals (\$1,029.79) and taxi expenses (\$109.20) will not be awarded. Total costs in the amount of **\$44,974.95** will be awarded.

Conclusion

Accordingly, for the foregoing reasons, Defendants shall be awarded **\$263,740.55** in fees and costs. An accompanying Order will issue this date.

s/Renée Marie Bumb
RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

Dated: August 14, 2009